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Supreme Court of the United States

October 1955 Term

PHILIP ALBANESE,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit, which affirmed his conviction for violation of §145(b), Title 26, United States Code, and for a conspiracy to violate Title 26, United States Code, §145(b), and Title 18, United States Code, §1001.

(a) The Opinion Below

The opinion of the Court below has not yet been officially reported. A copy of said opinion is contained in the certified record filed simultaneously with the instant petition.

(b) Statement of Grounds of Jurisdiction

(1) The judgments of the Court of Appeals for the Second Circuit were entered on June 2, 1955; the judgment of the United States District Court for the Southern Dis-

trict of New York making those judgments a judgment of the said District Court was made and entered on July 1, 1955.

(2) No application for a rehearing was made.

(3) The jurisdiction of this Court is invoked pursuant to 18 U. S. C. Rule 37 and 28 U. S. C. §1254.

(c) Questions Presented for Review

1. Was any conspiracy to violation §1001 of Title 18, U. S. C., as referred to in the conspiracy count, barred by the three year statute of limitations and should said count have been dismissed.

2. Did the District Court for the Southern District of New York have jurisdiction in connection with Counts I and III of the first indictment by reason of the fact that income tax returns which were the subject matter of those counts were filed with the Collector of Internal Revenue for the 14th District, at Albany, New York.

3. Did the Government make out a case for submission to the jury, in view of the fact that none of the tax returns referred to in both indictments was signed by the petitioner but were signed by persons other than petitioner without his consent or authority.

4. Did the Trial Court commit prejudicial error in permitting proof in connection with acts done and statements made before the commencement and after the termination of the alleged conspiracy.

5. Did the Trial Court commit prejudicial error in permitting proof in connection with the 1946 tax return which

was not the basis of any of the counts contained in either indictment.

(d) Statutes Relied On

The statutes under which petitioner was prosecuted read as follows:

Section 145(b), Title 26, United States Code:

> "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 1001, Title 18, United States Code:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statement or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

(e) Statement of Case

Two indictments were handed down against petitioner and his brother, Rosario Albanese. The first indictment, C-142-126, charged petitioner, on four counts, with attempting an evasion of his income tax, in violation of Title 26,

U. S. C., Section 145(b), and charged Rosario Albanese, on two of the counts, with aiding and abetting.

The first count of said indictment charged, in substance, that the petitioner operated a loading business on Piers 27 and 28, North River, City of New York, and that he unlawfully, wilfully and knowingly attempted to defeat and evade a large part of the taxes due and owing by him by preparing and causing to be prepared and causing to be mailed, in the Southern District of New York, and by filing and causing to be filed, with the Collector of Internal Revenue for the Fourteenth District, at Albany, New York, a false and fraudulent income tax return for the period 1947, wherein he alleged that he was an employee of Rosario Albanese and Rocco Guarino in a loading business and received a certain salary, whereas he had been the employer of Rosario Albanese and Rocco Guarino and had received a certain income from said loading business in excess of said amount declared as salary.

Count II of the indictment set forth, in substance, that petitioner was the owner of a loading business at Piers 27 and 28, North River, City of New York, from which business he had received a certain net income for the calendar year 1948 and that he wilfully, unlawfully and knowingly attempted to defeat and evade payment of the taxes due and owing by him by having said business operated in the name of Rocco Guarino and that petitioner failed to report said income to the Collector of Internal Revenue for the Second Collection District of New York.

Count III of the said indictment is similar to the first count except that the charges are made as against both defendants and that the period covered is the calendar year 1949.

County IV charged both defendants with a wilful attempt of tax evasion by preparing and filing a false and fraudu-

lent tax return for 1950 with the Collector of Internal Revenue for the Second Internal Revenue Collection District, in which they understated their income for 1950 (R. 2166-2171; App. 10a-13a).

The second indictment, C-143-289, under Count I, charged both defendants with conspiring with each other, and with one Rocco Guarino, to violate Title 26, U. S. C. A., Section 145-b, and Title 18, U. S. C. A., Section 1001. The conspiracy alleged in said count refers to the preparing and filing of false and fraudulent tax returns for the years 1947 to 1950, to wit, to the substantive crimes alleged in the first indictment above referred to.

Count II of the second indictment charged petitioner with attempted evasion of his income tax, in violation of Title 26, U. S. C. A., Section 145-b. Said count refers to the calendar year 1950 and is similar to Count II of the first indictment except that it sets forth the filing of a false and fraudulent income tax return for said year (R. 2278-2282).

Both defendants pleaded not guilty.

Two motions for a dismissal were made by the defendants prior to the trial.

The first motion for dismissal sought to dismiss Counts I and III of the first indictment upon the ground that the offenses referred to in said counts are not alleged to have been committed in the Southern District of New York. Said motion was denied by the Honorable Irving R. Kaufman. Judge Kaufman's opinion appears at R. 2192-2199 (App. 24a-30a) and the order with respect thereto appears at R. 2201, 2202.

The second motion for dismissal sought to dismiss Counts I and II of the second indictment upon the ground, among others, that the crime charged in Count I was barred by the statute of limitations and Count II of the second in-

dictment was identical with the crime charged in Count II of the first indictment (R. 2283 to 2292). In view of this duplication the Honorable Henry W. Goddard, District Judge, dismissed Count II of the first indictment but denied the motion to dismiss Count I of the second indictment (R. 2293-2300; App. 30a-36a).

The case was tried before the Honorable Alexander Bicks, District Judge, and a jury, and at the beginning of said trial the two indictments above referred to were consolidated (R. 2 to 9). The testimony adduced at the trial will be hereinafter discussed. Said trial resulted in a verdict of guilty against petitioner on all of the remaining counts of both indictments, to wit, Counts I, III and IV of the first indictment, and Counts I and II of the second indictment (R. 2076). There was a disagreement with respect to the defendant Rosario Albanese (R. 2077). Based on the aforesaid conviction District Judge Bicks sentenced petitioner as follows: on indictment C-142-126—five years on each of Counts I, III and IV to run concurrently, and a fine of $5,000.00 on Count IV, the said appellant to stand committed until the fine on Count IV is paid or is otherwise discharged according to law; on indictment C-143-289—five years on Count II, the sentence on Count II to run concurrently with the sentence on Counts I, III and IV of the indictment C-142-126, five years on Count I, execution on said Count I having been suspended; probation for five years, to begin after release from imprisonment on Count II of indictment C-143-289, and on Counts I, III and IV of indictment C-142-126, subject to standing probation order of said Court (R. 2164, 2165; App. 17a-19a).

Petitioner appealed from said judgment and sentence (R. 2249-2252; App. 140a-149a). Petitioner commenced serving his sentence while said appeal was pending. Petitioner's conviction was thereafter affirmed by the United States Court of Appeals for the Second Circuit.

(f) Jurisdiction of the Court Below

The District Court had jurisdiction under Title 26, U. S. C. §145(b) and Title 18, U. S. C. §1001.

The Court of Appeals had jurisdiction under Title 28, U. S. C. §1291.

(g) Reasons Relied On

As to Question 1

The decision of the Court below, in connection with its affirmance of Judge Goddard's denial of petitioner's motion to dismiss the conspiracy count is in conflict with the decision of this Honorable Court in *Ex parte Bain,* 121 U. S. 1, 7 Sup. Ct. 781, which stands for the principle of law that the Court may not amend an indictment without resubmission to the Grand Jury.

The instant case comes directly within the general rule of the *Bain* case, cited *supra,* and is easily distinguishable from all six cases cited by Judge Goddard in support of his holding.

In the *Bain* case, precisely as in the instant case, a motion was made to dismiss the indictment and, upon the motion, the Trial Court deleted part of the indictment which it considered defective, as surplusage, and after having so saved the indictment denied the motion to dismiss. This Honorable Court, in granting the writ of habeas corpus, made an exhaustive analysis of all pertinent English and American authorities and clearly defined the functions of the Courts as compared to that of the Grand Jury.

This Court in the *Bain* case, cited *supra,* properly stated that it is not for the court to say whether the jury would have found the indictment without the language deleted

by the Court. So in the instant case, it was not for Judge Goddard to say whether the jury would have handed down the conspiracy count if it had known that the conspiracy to violate Section 1001 was barred by the statute of limitations. On the contrary, it may be very well assumed that the Grand Jury would not have indicted the defendants for a conspiracy to violate Section 145(b) of the Internal Revenue Code alone inasmuch as the Grand Jury very well knew that the defendants had already been indicted for the substantive crime of Section 145(b) on four counts of the first indictment and on the second count of the second indictment, simultaneously with said conspiracy count.

The gravamen of the charge contained in the conspiracy count is the alleged conspiracy to defraud the United States and to commit the offense of Section 1001 of Title 18, U. S. C. A., and that the reference to Section 145(b) of Title 26 was merely incidental. If there was any surplusage in said count that surplusage, without question, would be the reference to Section 145(b) of Title 26 and not the reference to Section 1001 of Title 18.

After the Government had obtained an indictment on four substantive counts involving tax crimes *per se* the apparent purpose of the new indictment was to charge the defendants with a conspiracy to defraud the United States, pursuant to Section 1001, Title 18. This becomes particularly clear from the fact that the indictment, at the end of the conspiracy count, refers to Title 18, Section 371, U. S. Code, to wit, the general conspiracy statute, without any reference whatsoever to Section 3748 of the Internal Revenue Code, the only section which refers to a conspiracy to commit a tax crime. If the Grand Jury had really intended to indict the defendants for a conspiracy to commit a tax crime the conspiracy would and should have been worded differently. In that case the conspiracy count would

have charged that the defendants conspired to defeat and evade a certain tax, pursuant to Section 145(b) of Title 26. Only in that case would the statute of limitation have been extended to six years, pursuant to the clear wording of the last paragraph of Section 3748(a).

Petitioner is of the opinion that the error committed by Judge Goddard in not dismissing the conspiracy count was not only important in connection with said count itself but in connection with all counts of both indictments. The record fully discloses that substantial parts of the evidence were admitted by the Trial Judge only in connection with the conspiracy count. If said count had been dismissed such evidence would have been inadmissible under the substantive counts of both indictments. Without such testimony the substantive counts of the indictment would have had to be dismissed. Therefore, petitioner respectfully submits that if this Honorable Court considers the entire conspiracy count barred by the statute of limitations then such ruling must lead to a reversal of the conviction on all of the remaining counts.

In any event it cannot be said that the jury would have come to the same conclusion as to the substantive counts without having before them the testimony which was admissible only by reason of the conspiracy count.

As to Question 2

The decision of the Court below in connection with the affirmance of Judge Kaufman's denial of the motion to dismiss Counts I and III of the first indictment is in direct conflict with the decisions of the United States Court of Appeals for the Fourth Circuit in *United States* v. *Newton,* 68 Fed. Supp. 952, aff'd 162 Fed. (2d) 795, and *United States* v. *Kelley,* 105 Fed. (2d) 912.

It appears from Count I of the first indictment that the petitioner was charged with filing a false and fraudulent income tax return for the calendar year 1947 with the *Collector of Internal Revenue for the Fourteenth District, at Albany, New York.* It appears from Count III of said indictment that said count charges both defendants with the filing of a false and fraudulent tax return for the calendar year 1949 with the *Collector of Internal Revenue for the Fourteenth District, at Albany, New York.*

An indictment containing said counts should not have been handed down in the Southern District of New York, since the offenses alleged therein were not committed in said district. Rule 18 of the Federal Rules of Criminal Procedure reads as follows:

> "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."

The law is well settled to the effect that the offense of filing a false and fraudulent tax return is committed where the filing of said tax return takes place and not where the tax return is prepared and mailed from. The allegations contained in Counts I and III to the effect that the tax returns in question were prepared and caused to be prepared and mailed in the Southern District of New York did not confer jurisdiction on the said Court.

In *Bowles* v. *United States*, 73 Fed. (2d) 772, the tax return was prepared and mailed in the District of Columbia and the Collector of Internal Revenue, where it was filed, was at Baltimore, Maryland. The Court, in that case, found that the preparing and mailing of the tax return

in the District of Columbia did not confer jurisdiction on the Court in the District of Columbia but that the District Court for the District of Maryland had jurisdiction of the prosecution of the case, stating, at page 774, as follows:

> "The crime charged in the third and fourth counts was the filing of a false return. The offense was committed at the place where the filing took place upon delivery at the office of the Collector in Baltimore. Wampler v. Snyder, 62 App. D. C. 215, 66 F. (2d) 195.
>
> The offenses having been committed in the State of Maryland where the Collector's office is located and where the return should be filed, it follows that the District Court of the United States for the District of Maryland had jurisdiction of the offense charged."

It appears from the foregoing that only the United States District Court for the Northern District of New York, where the tax returns referred to in said Counts I and III were filed, had jurisdiction of this prosecution and not the United States District Court for the Southern District of New York.

As to Question 3

The holding of the Court below that it is of no import that petitioner did not personally sign any of the returns filed in his name is a novel and substantial question which should be reviewed by this Honorable Court and the reliance of the Court below on the decision of this Honorable Court in *Spies* v. *United States,* 317 U. S. 492, is clearly erroneous since that decision does not stand for the propositon that a taxpayer can be prosecuted on the basis of tax returns not signed by him.

The testimony is abundantly clear that petitioner never signed any of the tax returns for the years 1947 to 1950 inclusive. The Government has entirely failed to prove the charges made in both indictments to the effect that petitioner had prepared and filed, or caused to be filed, false and fraudulent tax returns. Since the evidence is overwhelming that petitioner had not the slightest knowledge of the preparation and filing of the tax returns by the accountant, Moscarella, petitioner cannot be made criminally responsible for said tax returns.

In view of the fact that the Government could not deny that none of the tax returns was signed by petitioner and no proof was introduced to show that petitioner had authorized Moscarella, either orally or in writing, to sign his name, the Government, in connection with the motions for bail, relied heavily on the testimony of the Treasury Agent Dugan in order to prove an admission on the part of the appellant. Petitioner respectfully submits that said testimony was so contradictory and improbable that it was entirely outweighed by the clear and convincing testimony of Markowitz, former attorney for petitioner.

Since the witness Dugan changed the dates of said interview several times but Markowitz was absolutely definite in fixing the date as at February, 1952, which was the original date given by Mr. Dugan, there was no credible evidence in existence which could have been submitted to the jury. Markowitz positively and repeatedly stated that none of the admissions referred to by Dugan ever took place, that as a matter of fact the appellant did not say one single word in his office in Mr. Dugan's presence, that as a criminal lawyer he would never have permitted him to talk and that the entire purpose of his meeting in his office was the service of a certain paper on the appellant. Moscarella, by signing the name of petitioner, as taxpayer and not as

agent, assumed full civil and criminal responsibility for said tax returns.

Section 51(c) of the United States Code, Title 26, reads as follows:

> "Persons under disability. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer."

No attempt was made by the Government to prove that petitioner was unable to make his return by reason of any disability or that he had given any written authority, either to Moscarella or to anybody else, to sign the tax returns on his behalf. A perusal of the tax returns discloses that Moscarella did not sign the returns in the space provided for the signature of the agent, or the person who prepared the tax return, but in the space provided for the signature of the taxpayer. As a matter of fact he signed the name of petitioner Philip Albanese, as such, without disclosing in any shape, manner or form, that said return was not signed personally by petitioner but by said Moscarella.

In view of the fact that Guarino, a witness called by the Government, testified that he and not the petitioner had "authorized" Moscarella to sign petitioner's name without the permission of petitioner himself, any conviction based on the false and fraudulent filing of tax returns by petitioner should have been reversed. Assuming, without conceding, that petitioner had failed to file any tax returns, or to pay any tax, this would not be a felony, under Section 145(b) of Title 26, U. S. C. A., but simply a misdemeanor, for which petitioner was not indicted.

The difference between a wilful attempt to evade taxes, under Section 145(b), and the misdemeanor of not filing

a tax return and not payment a certain tax under Section 145(a), was authoritatively discussed by this Honorable Court in *Spies* v. *United States,* cited *supra.*

In this connection it is interesting to note that although this Honorable Court advanced various illustrations in order to indicate a wilful attempt to defeat and evade, such as keeping of double set of books, making false entries or alterations, false invoices or documents, etc., etc., the conducting of a business in the name of another was not considered as an indication of a wilful attempt to defeat and evade taxes.

Petitioner respectfully submits that it is not a violation of the Internal Revenue Laws and, as a matter of fact, is not a crime at all, to conduct a business in the name of another. This is not an extraordinary situation since businessmen very often conduct their business in the name of others for various reasons. In most of the instances those reasons are perfectly legitimate but even if the reasons are not legitimate, and there may be a violation of some state law in connection with the conduct of a business in the name of another, said fact certainly does not constitute a violation of the Internal Revenue Laws. In the instant case the Government entirely failed, and even did not attempt, to prove that the alleged transfer of the business from petitioner to Rocco Guarino, while petitioner retained beneficial title thereto, was made for an illegitimate purpose.

In the instant case it is uncontested that petitioner neither prepared nor signed the tax return and said circumstance was therefore most material and the Trial Court, having failed to direct a verdict of acquittal, should have at least instructed the jury as requested. However, this case should not have been given to the jury since the Government failed

to make out a *prima facie* case against petitioner. To that effect see: *United States* v. *Cole, et al.*, 90 Fed. Supp. 147.

As to Questions 4 and 5

The Trial Court admitted considerable testimony in connection with statements by Rocco Guarino, an alleged co-conspirator, as well as testimony of said Rocco Guarino himself. In this connection the Trial Court stated as follows:

> "The Court: This will be admitted subject to connection. You recall Rocco Guarino is mentioned in the indictment as one of the co-conspirators, and if the jury find a conspiracy did in fact exist and Mr. Guarino was one of the co-conspirators, any statements made or acts by him in furtherance of the conspiracy are admissible" (R. 171a).

However, the Trial Court overlooked the fact that the first overt act alleged in the indictment took place in 1947 and that the last overt act took place in 1950, and admitted considerable testimony in connection with acts done and statements made by said co-conspirator prior to 1947 and subsequent to 1950. The law is well settled to the effect that any acts or declarations of alleged conspirators prior to the formation of the conspiracy or after its termination are not admissible against his alleged co-conspirator.

Lutwak v. *United States*, 344 U. S. 604, 73 Sup. Ct. 481;
Bartlett et al. v. *United States*, 166 Fed. (2d) 920.

Particularly, all of the statements made by Rocco Guarino to the Assistant United States Attorney, which were admitted into evidence over the objection of petitioner, as counsel to the defendants, must necessarily have been made

after the termination of the conspiracy since those statements were made after the first indictment was handed down and after the last overt act referred to in the second indictment. Although the Trial Court endeavored to eliminate the prejudicial effect by charging the jury similarly to the Defendants' Request to Charge numbered 35, said charge, as given by the Trial Court, could not eradicate the prejudicial effect which the erroneous admission of evidence in connection with acts, declarations or statements prior to the formation of the conspiracy and after its termination must have had on the jury. As the late Mr. Justice Jackson so aptly stated in *Krulewitch* v. *United States,* 336 U. S. 440, 93 L. Ed 790:

> "* * * the naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."

The Trial Court committed various other errors in the admission and exclusion of evidence. One of the most flagrant errors in this respect was the admission of evidence concerning the 1946 tax return, which was not the basis of the instant indictments against either of the defendants. Yet the Trial Court permitted the Government, in extended cross-examination of the defendant Rosario Albanese, to introduce evidence in connection with said 1946 tax return. Said admission was clearly erroneous and must have been prejudicial to petitioner and was not even admissible for the purpose of attacking petitioner's nor the defendants' credibility, since neither of the defendants was ever convicted, or even charged with a tax violation relating to the year 1946.

CONCLUSION

It is respectfully submitted that the various questions raised are of such importance in the administration of the criminal law and particularly of the law relating to income tax evasions that there should be an authoritative determination of the same by this Honorable Court. Accordingly, petitioner asks that this Court issue a writ to review the judgments of affirmance herein.

Respectfully submitted,

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